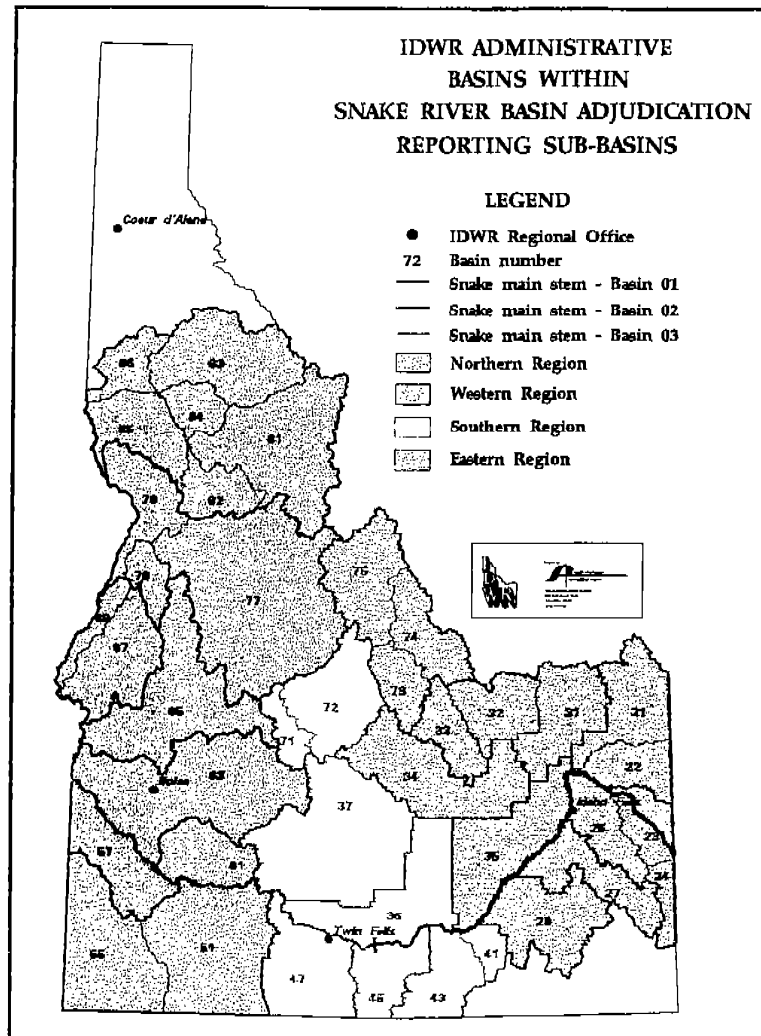


## 1994 INTERIM LEGISLATIVE COMMITTEE

ON

## THE SNAKE RIVER BASIN ADJUDICATION



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1994 LEGISLATIVE COUNCIL COMMITTEE REPORT  
ON  
THE SNAKE RIVER BASIN ADJUDICATION

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## **I. CHARGE TO 1994 LEGISLATIVE COUNCIL COMMITTEE ON THE SNAKE RIVER BASIN ADJUDICATION**

House Concurrent Resolution No. 70 directed the Legislative Council Committee on the Snake River Basin Adjudication to study and report back to the 1995 Idaho Legislature on the following matters:

1. Methods of funding the Snake River Basin Adjudication;
2. Measures that can be taken to facilitate the participation of small claimants in the Snake River Basin Adjudication;
3. Means for spreading the cost of the resolution of basin-wide issues; and
4. Actions the Legislature should take to facilitate the development of a long-term management plan for the administration of surface and ground water supplies in Idaho.

The Committee met five times to consider these matters. Testimony was received from the claimants, the private attorneys, the Idaho Department of Water Resources (IDWR) and the judiciary. The following report summarizes the Committee's findings and recommendations.

## **II. REASONS FOR THE ADJUDICATION**

Although the Snake River Basin Adjudication (SRBA) was authorized as part of the legislation enacted in 1985 to settle the Swan Falls water rights dispute between the Idaho Power Company and the State of Idaho, the genesis of the adjudication came from a report of the Snake River Technical Advisory Committee. This Committee consisted of fifteen members representing state and federal water resource agencies, the Idaho Public Utilities Commission, consulting hydrologists, Idaho Power Company, the Idaho Water and Energy Resources Research Institute and the Swan Falls Water Rights subcommittee of the Legislative Council. The purpose of the Committee was to "determine the scope and priority of needed hydrologic studies required to assist in planning, management, water rights administration, regulation and litigation of the Snake River system in Idaho above Swan Falls." *Needed Water Resources Programs in the Snake River Basin* at 1 (1983). The Technical Committee recommended initiation of a general stream adjudication for the following reasons:

If water resources in the Snake River Basin are to be managed for maximum beneficial use within the constraints of the Constitution, laws of the State and new directives of the legislature, the priority of those rights must be established. There are presently a number of decrees affecting surface and ground water tributary to the Snake River Plain. These decrees were created and operate in a vacuum. They do not acknowledge the existence of other tributaries they may affect or rights listed in the decrees are or may be subordinate to other rights not listed. These decrees are not effective vehicles for management of the entire system.

The procedure to quantify all rights to use waters of the Snake River system within Idaho is a general adjudication pursuant to I.C. Section 42-1406, et seq. This statute permits the State to require the federal government to quantify its reserved rights, in addition to permitting the quantification of statutory claims. Delay could cause piecemeal adjudication of federal claims in federal court.

Id. at 35 (1983).

The federal reserved water rights need to be adjudicated because they are a cloud over all other water rights and threaten to undo any water planning done by the state. The federal reserved water rights doctrine arises from *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the United States Supreme Court held that when Congress establishes an Indian reservation, it also impliedly reserves sufficient water to achieve the purposes for which the reservation was created. This judicial doctrine was extended to other federal reservations of lands in *Arizona v. California*, 373 U.S. 546 (1963). Because these rights have never been quantified and are not subject to state beneficial use requirements, they constitute a threat to all state water rights junior in priority to the reserved water rights. Moreover, any state water planning is suspect for the same reason.

### III. HISTORY OF THE SNAKE RIVER BASIN ADJUDICATION

#### A. *Description of the Hydrology of the Snake River*

The Snake River is one of the great rivers of the western United States. It rises along the continental divide near Yellowstone and Grand Teton National Parks in Wyoming, and travels across southern Idaho in a broad crescent. Along the way it joins with such rivers as the Henry's Fork, the Blackfoot River, the Big Wood River, the Bruneau River, the Boise River and the Payette River. At the western boundary of Idaho, the Snake River completely leaves the State of Idaho and flows into the State of Oregon for a short distance and then turns north. The Snake River forms the boundary between Idaho and the states of Oregon and Washington while passing through the nation's deepest gorge, Hells Canyon. Along the way the Salmon River, the fabled "River of No Return" of the Lewis and Clark expedition, drains into the Snake River from the huge wilderness of central Idaho. Further north, the Clearwater River flows into the Snake River near Lewiston where the Snake River leaves the state. The total land area upstream from this point encompasses approximately 87% of the total land area of the state.

The Snake River Plain is a broad crescent-shaped plain extending from Ashton, Idaho, in the east to Weiser, Idaho, in the west. The plain is from 30 to 75 miles wide and is bordered or intersected by the main stem of the Snake River. The plain is divided geographically into an upper and lower plain with the dividing line roughly located at King Hill, Idaho.

The Upper Snake River Plain is underlain by a large aquifer which is hydraulically connected with the Snake River at various points from Heise to Thousand Springs. At some points, the Snake River supplies the Snake River Plain Aquifer with water, and at other points the

reverse happens. The most significant interchanges occur at American Falls and Thousand Springs. The Snake River Plain Aquifer currently discharges about 2,500 cubic feet per second (cfs) of water to the Snake River at American Falls and about 5,000 cfs at Thousand Springs.

The discharge of the Thousand Springs has been estimated for the period 1902 to 1993. In 1902 the average discharge of the Thousand Springs was slightly more than 4,200 cfs. In 1913 the annual discharge of the springs began to show a significant increase, a trend that generally continued until the late 1940's. From the late 1940's until the mid 1950's the annual average discharge of the springs continued to increase, on the average, but at a lower rate than had occurred during the past 35 years. The peak annual average discharge of the springs during this period occurred in 1957 with an average flow of slightly less than 6,900 cfs. After 1957, the annual average discharge of the Thousand Springs began to decrease, on the average, with an annual average discharge of over 5,000 cfs in 1993.

The generally accepted explanations of these changes in the flow of the Thousand Springs are that irrigation diversions to the north side of the Snake River provide ground water recharge that increases the flow of ground water discharged from the springs. Conversely, ground water withdrawals on the Snake River Plain divert water that otherwise would flow into the Snake River at Thousand Springs. The three year study of the Snake River Plain Aquifer will provide a better understanding of the relationship between diversions from ground water on the Upper Snake River Plain and the discharge from Thousand Springs to the Snake River.

The springs in the American Falls reach of the Snake River also augment the surface flow of the Snake River. These springs have been affected by upstream surface diversions and by diversions from ground water for that portion of the Snake River plain tributary to the Snake River above Milner Dam.

Other factors also influence the American Falls and Thousand Springs discharges to the Snake River. The United States re-authorized the construction of Palisades Dam and Reservoir in 1950. A provision of the authorizing legislation required that the Secretary of the Interior undertake a program to provide for an average annual savings of 135,000 acre-feet of surface water in the winter that was then being diverted for stock water and other uses. The legislation contemplated that users would replace these surface diversions with diversions of ground water. The Secretary of the Interior entered into contracts with various water user organizations to achieve this winter surface water savings, which permitted a more reliable refill of the reservoirs. These changes in water management caused a substantial annual depletion of water recharge to the Snake River Plain Aquifer.

Finally, the State of Idaho has experienced seven years of drought in the last eight years. Because of the drought, water users on the Snake River Plain and elsewhere have relied more heavily on ground water sources. The greater withdrawals from ground water have contributed to a further depletion of surface flows in the Snake River below Milner Dam.

## B. *The Development of Hydropower*

In the 1920's, the federal government encouraged a massive expansion of hydroelectric facilities by enactment of the Federal Power Act. Since hydroelectric facilities require large amounts of water, the United States Department of the Interior realized there would be a conflict over the use of the state's limited water supply for the additional hydroelectric facilities. Thus, the Department of the Interior adopted a policy of requesting the Federal Power Commission to subordinate hydropower water right licenses for hydroelectric facilities to upstream consumptive uses.

Historically, the state also maintained that hydropower water rights should be subordinated to upstream consumptive uses. This policy was placed into article 15, section 3 of the Idaho Constitution in 1929 and reflects the philosophy that the limited waters of the state should be used to the maximum extent possible before the waters flow out of the state. The policy resolves the inconsistency created by use of water for power purposes and the prior appropriation doctrine. Without subordination, a senior downstream appropriator for a hydropower use could monopolize the entire water supply.

During the period from 1945 to 1965 the United States Bureau of Reclamation and Idaho Power Company competed to build hydroelectric facilities on the Snake River downstream of Weiser. The Bureau of Reclamation proposed a single, large dam. Idaho Power Company proposed three smaller dams. A major issue in the dispute concerned the subordination of the hydropower water rights to upstream depletion by irrigation uses.

R. P. Parry, counsel for Idaho Power Company, testified during the Federal Power Commission licensing hearings for the Hells Canyon hydroelectric facilities as follows:

Historically, the applicant has always conceded that water rights for future irrigation development shall have precedence over hydroelectric water rights. All water licenses being currently issued by the State of Idaho provide specifically that this shall be true. And it is obvious that this Commission would not authorize any project without making the same requirement.

Minutes of Federal Power Commission, *In the Matter of Idaho Power Company, Project Nos. 1971, 2132, 2133* at 1240 (July 1953). Until 1977, officers of Idaho Power Company continued to take this legal position. Based on these representations, the Federal Power Commission, at the request of the State of Idaho, included a provision in the Federal Power Commission license that subordinated the operation of the facilities in the Hells Canyon hydroelectric complex to the upstream depletionary uses.

This policy of subordination of Idaho Power Company's water use to upstream development, however, was not fully reflected in the Company's state water rights. Some of the state water rights for the Hells Canyon hydroelectric complex, which includes three dams on the Snake River, did not contain an express subordination provision. Moreover, the state water rights for other mainstem Snake River hydroelectric facilities upstream from Hells Canyon Dam

did not include subordination provisions. The absence of subordination provisions in the Company's water rights for the Swan Falls Dam located south of Kuna provided the basis for the Swan Falls dispute.

C. *The Development of Irrigated Agriculture from 1955-1975*

The combination of cheap hydroelectric power and better pumps created a boom in irrigated agriculture in southern Idaho. Private development added an average of 50,000 irrigated acres a year during this period. This development occurred on the Snake River Plain by pumping ground water and downstream of Milner Dam by high lift diversions of surface water from the Snake River. Because these users expanded the market for its power, Idaho Power Company actively encouraged this development of irrigated agriculture despite the fact that such development reduced the amount of water available to fill its water rights.

D. *The Addition of Idaho Constitution Article 15, Section 7*

In 1963, water developers in California proposed the diversion of water from the Snake River near Twin Falls to a tributary of the Colorado River for re-diversion to Los Angeles at existing downstream diversion facilities on the Colorado River. The reaction in Idaho was swift. Governor Smylie concluded that Idaho's water would never be safe from outside interests until it was put to use in the State of Idaho. Therefore, he proposed that the Legislature create a constitutional water agency with the responsibility to formulate and implement a water plan for the State of Idaho. Idaho voters ratified the proposed constitutional amendment at the general election on November 3, 1964.

E. *The Swan Falls Water Rights Dispute and its Settlement*

Idaho Power Company's service area experienced substantial growth in electrical demand from late 1960 to early 1970. Economic projections indicated a continuation of this trend. This growth prompted Idaho Power Company to propose construction of the Pioneer coal-fired facility south of Boise. This project was opposed by many ratepayers and ultimately led to the filing of a complaint in 1977 with the Idaho Public Utilities Commission that alleged Idaho Power Company had not protected its water rights from upstream junior depletionary uses. The ratepayers requested that the Commission provide rate relief as a consequence. The Commission stayed action on the complaint to give Idaho Power Company an opportunity to clarify its water rights.

Idaho Power Company filed an action against a small number of junior water users upstream from the Swan Falls Dam for the purpose of determining whether its water rights for the facility were unsubordinated. The District Court concluded that the Federal Power Commission licenses for the Hells Canyon complex had subordinated Idaho Power Company's rights at all of its other hydroelectric facilities upstream. In 1983, the Idaho Supreme Court reversed the District Court and remanded the matter back for trial on whether Idaho Power Company had forfeited, abandoned, or lost its water rights under other equitable theories.

Idaho Power Company then filed a new complaint seeking a determination that its state water rights for its hydroelectric facilities upstream from Hells Canyon Dam were prior in right to about seven thousand, two hundred water users. A vote in the Idaho Legislature to subordinate Idaho Power Company's water rights for these hydroelectric facilities failed. This failure provided an incentive for the State of Idaho to pursue actively both litigation and negotiation of the dispute. The Attorney General prepared for trial by conducting further discovery and further investigation into the actions and representations of Idaho Power Co. in securing its FERC licenses for the Hells Canyon hydroelectric facilities. Governor Evans in the summer of 1984 asked Jim Bruce, CEO of Idaho Power Company, and Attorney General Jim Jones to begin settlement discussions.

In October, 1984, the State of Idaho and Idaho Power Company entered into a settlement agreement regarding the entire Swan Falls water rights dispute. The State agreed to establish higher minimum flows in the Snake River of 3,900 cfs during the summer and of 5,600 cfs during the winter at the Murphy gage, which is located downstream from the Swan Falls Dam. The State also agreed that the water rights for Idaho Power Company's various hydroelectric facilities up to the amount of these minimum flows are unsubordinated. The Company agreed that its water rights above these minimum flows are subordinated to upstream use; however, the agreement permits the Company to use any water in the river up to the amount authorized by its state water rights subject to the requirements of beneficial use and the water right license conditions. The agreement incorporated the recommendation of the Snake River Technical Committee that the State of Idaho commence an adjudication of the water rights in the Snake River Basin. Finally, the agreement established a procedure for the allocation of the so-called trust water made available by the subordination of a portion of the Company's water rights. Conditions on the effectiveness of this agreement included actions by the Idaho Public Utilities Commission, the Idaho Legislature, and the Federal Energy Regulatory Commission (FERC).

The Boise Field Office of the Fish and Wildlife Service, U.S. Department of the Interior, opposed the approval of the Swan Falls Agreement by the FERC. It argued that the Fish and Wildlife Service managed islands in the Snake River that were part of the Deer Flat National Wildlife Refuge and that the islands would lose their value as habitat for nesting geese. It alleged that the flows included within the Swan Falls Agreement would allow land based predators to destroy goose nests and that the United States held a federal reserved water right that precluded such low flows. These claims delayed FERC action to approve the necessary amendments to the various FERC licenses.

The parties addressed this concern by seeking federal legislation directing the FERC to approve the settlement. While the Act of December 29, 1987, Pub. L. 100-216, 101 Stat. 1450, directed the FERC to enter the required order, Congress responded to the concerns of the Fish and Wildlife Service by funding a study of the effects of the Agreement on fish and wildlife. As a result of the study, the United States produced the following reports:

*Swan Falls Instream Flow Study*, (October 1992)



*Swan Falls Instream Flow Study, Annotated Bibliography, (October 1992)*

B. Zoellick & H. Ulmschneider, *Effects of the Swan Falls Water Agreement on the Snake River Islands of Deer Flat National Wildlife Refuge, (June 1993).*

*Simulation of Water Surface Elevations for the Snake River in the Deer Flat National Wildlife Refuge, Idaho, U.S.G.S. Water-Resources Investigations Report 91-4198.*

Reserved water rights claims filed by the United States for the Deer Flat National Wildlife Refuge in the SRBA are based upon these reports.

For its part, the Idaho Legislature implemented the Swan Falls Agreement by enacting legislation that directed the commencement of the Snake River Basin Adjudication. The legislation also required that the adjudication satisfy the requirements of the McCarran Amendment, 43 U.S.C. § 666, and included a funding mechanism for the adjudication by charging a flat filing fee for all claims and an additional variable fee for certain types of claims. The fees collected were intended to fund the entire adjudication effort. The fee schedule was developed by an ad hoc committee that included representatives of the federal government. The Bureau of Reclamation informed the committee that it would pay any required filing fees associated with the adjudication. An opinion from the Regional Solicitor's office for the United States Department of the Interior supported this statement.

F. *Amendment of Idaho's Adjudication Statute in 1986*

An ad hoc committee was formed in 1985 to review and improve Idaho's laws regarding water right adjudications. The committee included legislators, an attorney from the Shoshone-Bannock Tribes, persons representing private water user groups, and various state personnel. The purposes of this legislation were "to provide a statutory basis for incorporating a negotiated agreement between a federal reserved water right claimant and the State of Idaho into an adjudication, to provide a more efficient method for adjudications, to assure that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants, and to assure that state laws and procedures are adequate as a matter of federal law to adjudicate the rights of all federal reserved water right claimants." 1986 House Journal at 236.

The 1986 amendments made procedural changes to the existing laws and rules governing the conduct of general adjudications in Idaho's district courts. These changes include detailed requirements regarding the contents of a petition for a general adjudication, service of process on claimants and filing of notices of claim and objections to notices of claim.

G. *Negotiation of Federal Reserved Water Right Claims*

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation expressed concern to the Idaho Legislature about the proposed adjudication. They pointed out that litigation of federal reserved water right claims for Indian reservations had proven to be very expensive and divisive in other states. They asked the Legislature to adopt a policy favoring negotiation of federal

reserved water rights rather than a policy of litigation. The Idaho Legislature responded by adopting H.C.R. No. 16, 48th Idaho Legislature, First Regular Sess. (1985), which directed the Governor and the Attorney General to enter into negotiations with federally recognized Indian Tribes concerning the extent of the water rights of those Tribes. The Governor designated the Idaho Water Resource Board to be the lead agency in the conduct of the negotiations. The scope of the negotiations was later expanded to include federal reserved water right claims of various federal agencies, in addition to claims made on behalf of Indian Tribes.

Negotiations began with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in August, 1985. Concerned water users expressed a desire to be included in the negotiation process, and a seat at the table was provided for them. The negotiation of the Tribes' claims proved difficult for all concerned. But after five years of negotiations, the Shoshone-Bannock Tribes, the United States, the State of Idaho and the Committee of Nine, representing concerned water users, executed a settlement agreement, which Congress ratified with the Fort Hall Indian Water Rights Act of 1990, Pub. L. 101-602, 104 Stat. 3059. The Idaho Legislature also ratified the agreement. 1991 Idaho Sess. L. 547. The settlement agreement quantifies all of the Tribes' water right claims upstream from Hells Canyon Dam. Under the agreement, the Tribe will have approximately 581,000 acre feet of water annually to use on lands within the Fort Hall Indian Reservation. The agreement, however, is contingent upon the quantification of the water rights for the non-Indian portion of the Fort Hall Irrigation Project and court approval of the agreement.

The agreement provides almost 100,000 acre feet of unallocated storage space in Palisades and Ririe Reservoirs to non-Indian water users as mitigation for any impacts caused by the agreement on existing water rights. This is the first time that the United States has agreed to provide mitigation water to non-Indian water users affected by the quantification of Tribal federal reserved water rights. Moreover, the cost to the State of Idaho for implementation of this agreement will be less than \$400,000. By contrast, the state of Wyoming has expended in excess of \$15 million to quantify the federal reserved water rights for the Wind River Indian Reservation, which was created by the same treaty that created the Fort Hall Indian Reservation.

The agreement has been submitted to the SRBA District Court for approval. All objections to the approval of the agreement have been resolved except for nine objections by non-Indian Fort Hall Project water users. Trial on these objections will be in May, 1995, if necessary.

The State of Idaho also has negotiated settlement agreements resolving the United States' water right claims for the Idaho National Engineering Laboratory, the Craters of the Moon National Monument, and the Yellowstone National Park. Negotiations are ongoing with the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, the Nez Perce Tribe and the U.S. Forest Service.

#### H. *The Commencement of the Snake River Basin Adjudication*

Idaho Code § 42-1406A (now uncodified) directed that the geographic scope of the adjudication include at a minimum that portion of the Snake River Basin upstream of where the Snake River initially flows out of the State of Idaho near Parma, Idaho, and that the District Court could expand the scope of the adjudication if necessary to ensure the United States' participation in the adjudication. The IDWR filed with the SRBA District Court on June 17, 1987, the Petition to commence the Snake River Basin Adjudication. The Petition asked the SRBA District Court to determine the appropriate geographic scope of the adjudication and to commence the adjudication. The United States appeared and argued that the entire Snake River Basin within the State of Idaho must be included in the adjudication. The SRBA District Court entered its Order commencing the adjudication on November 19, 1987; the SRBA District Court determined that the geographic scope of the adjudication should include that land within the Snake River Basin upstream from where the Snake River leaves the state at Lewiston.

Water users within the Boise, Payette, and Weiser River drainages did not want the scope of the adjudication to include those drainages. These water users sought reversal of the District Court's order expanding the geographic scope of the adjudication to the entire Snake River Basin. The Idaho Supreme Court affirmed the Commencement Order, and the U.S. Supreme Court denied discretionary review of the matter in 1988.

#### I. *Service of Process and the Taking of Claims*

The 1986 adjudication statute established a two-step procedure for service of process for the massive adjudication. The first step, a Notice of Commencement of the Adjudication, was served on the State of Idaho, the United States, and on other potential claimants by publication in newspapers of general circulation, by posting in county courthouses, and by ordinary mail to real property owners. After completion of the first round service the statute required the IDWR to compare the notices of claim received with its own records to determine if there were any rights to water for which a notice of claim had not been filed. If the IDWR identified such persons, then the IDWR was required to follow a procedure established by the SRBA District Court for service on those persons who had failed to file a notice of claim. This second step is known as the second round service.

The first round service of process began in February, 1988, and continued through February, 1990. During this period, the IDWR served by ordinary mail over 440,000 notices on real property owners in Idaho and published notice in newspapers basin-wide. The mailing cost of the first round of service of process was \$153,000. The IDWR personnel time was in excess of \$5 million for service of process and claims taking. The second round service began as specific basins were investigated. The IDWR has received over 160,000 notices of claim. To date, the IDWR has completed second round service for nine reporting areas.

J. *Federal Filing Fee Litigation*

The McCarran Amendment, 43 U.S.C. § 666, allows the United States to be joined in a suit for determination of water rights in state court. Although the United States agreed that it was subject to the state procedures, it contended that the McCarran Amendment did not waive its sovereign immunity to payment of the adjudication filing fees required by Idaho Code § 42-1414. It filed a petition for writ of mandate in June, 1988, to prohibit the Director from requiring the fee for federal claims. The matter proceeded to trial, and the SRBA District Court denied the petition. The Idaho Supreme Court affirmed the SRBA District Court's decision, with two justices dissenting. The U.S. Supreme Court reversed the decision in May, 1993. As a consequence of the Supreme Court's decision, the United States refuses to financially support the SRBA, even though the approximately 50,000 claims filed by the United States account for almost a third of the total claims filed in the SRBA.

K. *The Conflict Regarding the Reporting of Water Rights*

The 1986 amendments to the adjudication statute provided that the Director would file with the SRBA District Court a Director's Report consisting of three parts: Part One includes the Director's description of water rights acquired under state law. Part Two includes the Director's abstract of water rights reserved under federal law. Part Three includes the actual Notices of Claim filed by the claimants with the Director. After filing of the Director's Report, parties to the adjudication have an opportunity to file an Objection to any description of a water right in a Director's Report. Any party has the right to file a Response to any Objection. After the close of the period for filing responses, the claimant and those parties who file an Objection or a Response proceed to trial on the nature and scope of the water right subject to an Objection.

The geographic size of the SRBA and the large number of claims required that the SRBA District Court divide consideration of the adjudication into smaller parts for review and determination. A controversy regarding how to divide the matter surfaced soon after the service of process had been completed. The IDWR initially recommended to the SRBA District Court that it proceed to determine the water rights for each of IDWR's forty-three administrative sub-basins. The basis for this recommendation was that the forty-three sub-basins roughly correspond to hydrologic sub-basins within the Snake River Basin.<sup>1</sup> The IDWR also needed to stage the timing of the reports in a manner to allow the IDWR to rotate the investigation and preparation of Director's Reports among its four regions. The United States objected. The SRBA District Court rejected the IDWR's proposal and set the matter for hearing.

The IDWR negotiated with the various interested parties and executed a stipulation regarding the geographic scope and staging of the sub-basins. The stipulation provided that the litigation would proceed with a total of twenty-four Director's Reports and that the Director would file Director's Reports for three test basins: Reporting Area 1 (IDWR Basin 34--the Big Lost River drainage), Reporting Area 2 (IDWR Basin 57--various small tributaries of the Snake

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<sup>1</sup> The division of the Eastern Snake River Plain into hydrologic sub-basins follows county boundaries because the surface topography provides no clear hydrologic boundary.

River in Owyhee County), and Reporting Area 3 (IDWR Basin 36--the Thousand Springs area and adjacent Snake River Plain). The use of test basins was included as a means to identify necessary and appropriate procedures for application to the remainder of the SRBA. In addition, the stipulation provided for the filing of a Director's Report for the 1990 Fort Hall Water Rights Agreement.

L. *The Director's Reports for the Three Test Basins*

The IDWR filed the Director's Reports for the three test basins in 1992. The number of claims and objections for the three test basins are as follows:

Reporting Area	No. of Claims	No. of Objections	No. of Contested WR	Number & Percentage of Objections filed by United States
Area 1 (IDWR Basin 34)	6,300+	1,120 <sup>2</sup>	941	274; 24%
Area 2 (IDWR Basin 57)	2,800+	600	561	457; 76%
Area 3 (IDWR Basin 36)	7,500+	518	478	149; 28%
TOTAL	16,600	2,238	1,980	880; 39%

M. *Basin-Wide Issues*

Because not all water right claims can be resolved at one time, concern arose that the SRBA District Court might resolve some issues that affect many other water users whose rights had not been reported. These water users wanted an opportunity to participate in issues of basin-wide importance. In response to this concern, the SRBA District Court established a procedure for consideration of basin-wide issues. The procedure operates as follows. Any party may request designation of a basin-wide issue. The SRBA District Court provides an opportunity for hearing and determines whether to designate an issue as a basin-wide issue. If the SRBA District Court designates an issue as a basin-wide issue, then all parties in the SRBA are provided notice that the issue will be decided. This allows all interested parties a chance to participate. In addition, the SRBA Court ruled that because some objections had been filed by claimants to the general provisions, there are no unobjected to claims.

To date, the SRBA District Court has designated four basin-wide issues: (1) the constitutionality of Idaho Code §§ 42-1416 and 42-1416A [since repealed], (2) the role of the Director of the Idaho Department of Water Resources in the SRBA, (3) the constitutionality of

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<sup>2</sup> The United States initially filed 1,465 objections. It later withdrew 345 objections.

the 1994 amendments to chapter 14, title 42, Idaho Code; and (4) the constitutionality of Idaho Code §§ 42-1425, 42-1426 and 42-1427.

N. *Conjunctive Management Studies*

The Northside Canal Company (NSCC) and Twin Falls Canal Company (TFCC) filed a complaint on July 29, 1992, in the SRBA against the IDWR alleging that the IDWR was harming them by the continued issuance of permits to certain classes of water users in the upper Snake River basin. The factual basis for the claim was that natural flow water rights held by NSCC and TFCC depended on spring discharges to the Snake River near American Falls and that pumping of ground water was diverting water that otherwise would flow into the Snake River as a spring discharge. The SRBA District Court dismissed the complaint of NSCC and TFCC without prejudice following execution of a settlement agreement by the parties. The settlement agreement provided for studies of the Snake River Plain Aquifer to determine the effect of ground water pumping on spring discharges. Those studies commenced in 1993 and will be completed by June 30, 1996.

O. *Amendment of the Adjudication Statute in 1994*

On February 4, 1994, the SRBA District Court issued a memorandum decision that found Idaho Code §§ 42-1416 and 42-1416A unconstitutionally vague. *Memorandum Decision And Order On Basin-wide Issue No. 1, Constitutionality of I. C. § 42-1416 And I. C. § 42-1416A, As Written* on February 4, 1994. These statutes established procedures for reporting and decreeing previously decreed and licensed water rights. At the same time, the role the Director should play in the adjudication became a major issue as well as the conjunctive management of surface and groundwater. The combination of these factors resulted in a call by many water users for legislative action. A package of bills was passed to address a broad spectrum of problems.

A major portion of the 1994 legislation addressed issues and concerns identified in general water right adjudications in the State of Idaho and in the Snake River Basin Adjudication. Many of the changes were adopted as a means for streamlining the adjudication and reducing the costs to the claimants as well as the state. The problems and the solution provided by this legislation are as follows:

1. The McCarran Amendment allows the United States to be joined in state proceedings for the adjudication of water rights and for the administration of those rights. The State of Idaho's petition to commence the adjudication sought both the adjudication and administration of all water rights. The United States contends, however, that its water rights can only be administered by a court. This statute amended chapter 14, title 42, Idaho Code to make clear that the Legislature intended to authorize an action within the full scope of the waiver of sovereign immunity in the McCarran Amendment, including the administration of the federal water rights by the Director in accordance with the decree entered by the District Court.

2. The decision of the U. S. Supreme Court in *United States v. Idaho*, \_\_\_ U.S. \_\_\_ 113 S. Ct. 1893 (1993), concluded that the State of Idaho could not impose on the United States the fees it charges other claimants. The 1986 adjudication procedures subsidized the determination of the United States water rights because the IDWR provided many services that in normal litigation a participant would have to bear. The 1994 legislation removed part of this subsidy by shifting these normal litigation expenses back to the United States and to other claimants of water rights established under federal law.

3. The 1994 amendments also addressed the role of the Director of IDWR. The amendments make clear that the Director's role is limited to informing the SRBA District Court and all parties to the adjudication of the technical information available and to providing an independent review of each state water right claim. The Director's investigation is intended to be a review based upon the readily available data and is not intended to be an exhaustive examination of each water right.

4. The SRBA District Court entered several orders imposing attorneys fees and costs against the Director in the SRBA relying on the private attorney general doctrine, I. C. § 12-117, and I. C. § 12-121. The SRBA District Court indicated that it would award attorneys fees under the private attorney general theory, regardless of whether a party prevailed, to the first party raising an issue. The amendments prohibit these awards. The Legislature determined that the State does not have the resources to pay these awards in a general adjudication. Moreover, such awards are inappropriate because the Director is not an adversarial party nor does he own a water right that will be affected by the decree. The claimants, because it is their water rights that are being adjudicated, are the actual parties in interest in this litigation and should bear the expense of proving their claims. Finally, the Legislature found that such awards simply served to encourage litigation and are an inappropriate taxpayer responsibility.

5. In response to the SRBA District Court decision striking down Idaho Code §§ 42-1416 and 42-1416A as unconstitutional, the Legislature repealed these sections and added new sections that specify the intent of the Legislature with more precision. The purpose of the amendments was to avoid time consuming appeals and to keep the adjudication focused on the purpose for its existence -- adjudication of water rights.

6. The 1994 amendments also directed the SRBA District Court to use settlement conferences to give claimants an opportunity to discuss and resolve a dispute short of trial. A number of claimants testified that the Court scheduling procedure was forcing them to retain an attorney and prepare for trial when in fact they felt that settlement discussions would resolve their concerns.

7. The contents of a description of a water right in a decree were the subject of much dispute in the SRBA. The 1994 amendments resolved this dispute in the SRBA by providing more detail about the contents of a water rights decree. The amendments require that the decree contain all information necessary to define the right as well as provide a basis for the proper administration of the water right by the IDWR.

P. *The Basin-Wide Issues 2 and 3 Decisions*

On December 7, 1994, the SRBA District Court issued its decisions in Basin-Wide Issues 2 and 3 and held that the Legislature violated the Idaho Constitution and the McCarran Amendment by enacting the 1994 amendments to the adjudication code. The SRBA District Court struck down as invalid all of the amendments except for sections 42-1425, 1426 and 1427. The basis for the SRBA District Court's decision are as follows:

1. The SRBA District Court first held, in what it called the "lynch-pin issue," [sic], that the SRBA must proceed as a standard civil lawsuit in order to maintain jurisdiction over the United States under the McCarran Amendment, which waives the United States' sovereign immunity from adjudication "suits" in state courts.
2. The SRBA District Court then held that the 1994 amendments violated the separation of powers doctrine, stating that the majority of the essential provisions of the 1994 Act were adopted in order to reverse interlocutory SRBA District Court decisions or to legislate the outcome of issues that were pending before the court at the time the 1994 Act was adopted. The SRBA District Court held that the Legislature's stated purpose for the 1994 Act, efficiency and fairness, was not the reason why these provisions were adopted. The SRBA District Court concluded the effect of the 1994 Act was to obtain results legislatively that the State, as a party, failed to gain before the SRBA District Court during the pendency of the action. The effect of this decision is that the Legislature cannot amend the 1986 Act to improve the operation of the SRBA or to ensure the SRBA proceeds as the Legislature originally intended.
3. The SRBA District Court then focused on what it termed changes to the party status of the State of Idaho and the role of IDWR. Even though the State is named in the petition in both its proprietary role and its regulatory role, and the Legislature appropriated, and the state agencies paid, filing fees for filing claims, the SRBA District Court concluded that the State of Idaho can only appear as one party in the SRBA. The SRBA District Court stated that the Legislature intended in the original adjudication statute that the State of Idaho would appear in the SRBA only through the Director of IDWR and that the new legislation making IDWR an independent expert changes this participation by the State of Idaho. The SRBA District Court determined that the Legislature cannot control the participation of state agencies before the court in this way. The SRBA District Court ruled that in the SRBA, the State of Idaho and its executive agencies, including IDWR, are one and the same.

The SRBA District Court directed state agencies and IDWR to resolve their disagreements regarding the State's proprietary claims and the rights of all other



claimants before a Director's report is filed. If the agencies cannot resolve their differences the Attorney General was ordered by the SRBA District Court to determine the State's position. The SRBA District Court called these issues "political questions."

Finally, the SRBA District Court concluded that the Legislature cannot make IDWR an independent expert. The SRBA District Court stated by virtue of IDWR's status as an executive agency of the State of Idaho, and because of IDWR's own clear interest in the outcome of the SRBA, IDWR is not, nor can it legislatively be declared to be, an independent party. The SRBA District Court concluded that in every contested action, IDWR is an adversary to water users who file objections to the Director's Reports.

4. The SRBA District Court also held that the 1994 Act is unconstitutional because it sought to include "administration" in SRBA decrees. The SRBA District Court held that the SRBA was intended to be a judicial process to "inventory" all rights to use water in the Snake River basin, including those of the United States. Further, the SRBA District Court held that provisions governing the delivery and distribution of water to Idaho water users requires the exercise of police power and that it violates the separation of powers doctrine to delegate these powers to the judiciary. The SRBA District Court concluded that only IDWR has the authority to administer water rights and that therefore administrative provisions could not be included in any water right decree. This decision raises questions regarding the validity of prior water right adjudication decrees that contain administrative provisions.

5. The SRBA District Court held that the Legislature unconstitutionally modified Idaho Supreme Court rules of procedure and evidence. The SRBA District Court without elaboration concluded that the provisions of the 1994 Act changing the Director's Report from a pleading to an expert report, prohibiting the award of costs and attorneys fees against the State, requiring mandatory settlement conferences, and dismissing the abstract of United States' claims filed with the court conflicted with the Idaho Rules of Civil Procedure and were void. The SRBA District Court concluded that the provisions of the 1994 Act removing the Director of IDWR's authority to participate as a party, designating him as a technical expert available to testify if called, addressing the admissibility of the Director's Reports, and addressing the weight to be attributed to those reports by the court conflicted with the Idaho Rules of Evidence and were void.

6. Finally, the SRBA District Court concluded that the State of Idaho has already consented to pay costs and attorneys fees in the SRBA and cannot withdraw its consent after the court's jurisdiction has attached. The SRBA District Court stated that when the State invokes the jurisdiction of a court for any purpose, the State waives its sovereign immunity and consents to the court's authority to order any remedy, including monetary awards against the State.

Finally, the SRBA District Court held that under the separation of powers doctrine, the Legislature may not alter the inherent authority of the court to award costs and fees.

In response to the constitutional issues raised by the decisions, the Committee met on December 14, 1994. At that meeting, University of Idaho Law School Professor Dennis Colson, a published authority on Idaho constitutional law, and Oregon's Assistant Attorney General Steve Sanders, an expert on the McCarran Amendment, testified that the SRBA District Court's analysis of the constitutional and McCarran Amendment issues is seriously flawed. Professor Colson testified that the Legislature was well within its constitutional powers when it enacted the 1994 amendments. Mr. Sanders testified that the McCarran Amendment waiver was not limited to purely judicial actions. He cited a federal district court decision in Oregon that supported his conclusion. On December 28, 1994, that decision was affirmed by the United States Ninth Circuit Court of Appeals. The Ninth Circuit states:

In fact, the active participation of administrative agencies is at the core of most of the "comprehensive state systems for adjudication of water rights" contemplated by the McCarran Amendment. While the traditional civil lawsuits may remain viable devices for the comprehensive adjudication of rivers with a small number of claimants, by 1952 it was clear that they were not well-suited for comprehensive adjudication of the rights in large rivers.

*United States v. Oregon*, 1994 W.L. 715102 (9th Cir. December 28, 1994). This Ninth Circuit opinion contradicts the SRBA District Court's conclusion that any portion of the 1994 Act that requires the SRBA to proceed differently from a normal lawsuit is not within the scope of the waiver of sovereign immunity contained in the McCarran Amendment. This opinion also refutes the undiscussed implication of the SRBA District Court's reasoning that even the 1986 adjudication statute is outside the McCarran Amendment waiver because it specifically created procedures that are not purely judicial.

On December 22, 1994, the SRBA District Court recommended that the Idaho Supreme Court grant permission to appeal its decisions. A motion for permission to appeal is pending before the Idaho Supreme Court.

#### **IV. STATE PARTICIPATION IN THE ADJUDICATION**

The State of Idaho participates in the Snake River Basin Adjudication in three distinct ways. First, Idaho's water is a critical public resource, and the State must effectively and fairly administer its water resources for the benefit of all citizens. The State's historical and scientific knowledge and experience makes its participation critical. Second, Idaho's economy is intimately tied to water, and therefore the State must participate to protect its control of the

State's water resources. The federal government's claims make Idaho's economy vulnerable to the federal government's whims. Finally, the State must appear in the Snake River Basin Adjudication to protect its own proprietary interests in water.

A. *Role of The Idaho Department of Water Resources*

The IDWR is the repository of the State's expertise regarding water resources and water rights. Additionally, the IDWR has substantial experience participating in water rights adjudications. The challenge to the Legislature has been to make this expertise and experience available to the SRBA District Court and to the State's citizens in a way that furthers the adjudication process but avoids burdening IDWR to the point it cannot perform the other functions of the agency.

In the legislation under which the Snake River Basin Adjudication was commenced in 1987, the IDWR was authorized to appear in the adjudication as a party. Although the IDWR claims no water rights on behalf of the State, the Legislature initially thought that by making the Director a party to the SRBA, IDWR could better provide its expertise to the SRBA District Court and other parties in the case. The Idaho Supreme Court recognized that designation of the Director as a "party" was simply a vehicle to inject the IDWR's expertise into the case:

The Director is really a disinterested party. The only interest the Director has is to see that all rights are accurately adjudicated. The Director does not oppose a claim, trying to subvert a valid claim. Nor does the Director stand to gain if a claim is invalidated.

*United States v. Idaho Department of Water Resources*, 122 Idaho 116, at 122-23, 832 P.2d 289, at 295-96; rev'd on other grounds, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1893 (1993). In this context, the IDWR served notice of the commencement of the adjudication on the water right claimants, received their claims, investigated the state law-based claims, and made recommendations to the SRBA District Court in the form of Director's Reports.

Unfortunately, the vehicle of having the IDWR as a party to the Snake River Basin Adjudication proved unworkable. The focus of the litigation shifted from a determination of water rights to adversarial litigation by certain claimants against the IDWR. The prospect of the IDWR litigating against the claims of Idaho's citizens was antithetical to the very reasons for the IDWR's participation in the adjudication in the first place--to ease the burden of the adjudication on Idaho's citizens and to assist the SRBA District Court with the complex legal and hydrological questions posed in the case. As a result, the Legislature amended the adjudication statute in 1994 to restore the IDWR to the role originally envisioned by the Legislature of a technical expert for the claimants and the court.

Under the new amendments the IDWR retained the duties it had under the 1986 amendment but was no longer authorized to participate as a party in adjudications. The IDWR continued to serve notice of the commencement of the adjudication, accept claims, and investigate the state law-based rights. The IDWR also made recommendations to the SRBA

District Court on the investigated rights. If no objections were made to those recommendations the rights were to be decreed. If an objection was filed, the Director's Report became evidence and the court or parties to the adjudication could have requested the IDWR to appear as a witness. In this way, the IDWR would have continued to provide services to the SRBA District Court and claimants. The Director's expertise was available to help with the accurate determination of rights. Providing these services through the IDWR served the twin goals of protecting Idaho's water resources, as well as easing the burden of the adjudication on all claimants.

The SRBA District Court, however, invalidated the 1994 Act. The SRBA District Court ordered IDWR to act as an adversarial party against every water user in the SRBA except in water right claims asserted by other state agencies. This was not the role contemplated by the Legislature in either the 1986 amendments or the 1994 amendments.

#### B. *Role of Other State Agencies*

From its commencement, under the 1986 amendments, other state agencies were authorized to appear in the SRBA to assert claims to water rights. State agencies were required to assert their claims in the same fashion as private water right claimants. Indeed, the Legislature appropriated funds for the agencies to pay the filing fees associated with their claims. State agencies submitted claims to water rights and paid filing fees to the IDWR for their claims. They have borne the burden of establishing their water right just as any other claimant is required to do. Further, like a private claimant, state agencies also objected to water right claims that impact their water rights. The 1994 amendments did not change this historic practice.

The SRBA District Court, however, in its recent decisions, ruled that state agencies must meet with IDWR to determine how the State's rights will be recommended. Agencies may no longer present their proprietary claims in court to have those claims adjudicated in a neutral tribunal nor may those agencies present objections to the Director's report. The SRBA District Court ordered IDWR to litigate on behalf of those state agencies. This fundamentally changes the Director's duties and authorities. This is so even though the state agencies paid filing fees to file their claims and the State of Idaho was named as a defendant in the original petition commencing the SRBA.

#### C. *Role of the Attorney General's Office*

The Attorney General represents the State of Idaho in all legal proceedings. As a constitutional officer, he has the duty to determine how to best represent the State's multiple interests and has properly performed this function since the commencement of the SRBA.<sup>3</sup> The District Court's decisions would fundamentally change his duties and authorities by requiring

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<sup>3</sup> While the Legislature explicitly directed the Attorney General to represent the State's interests with respect to the federal reserved water right claims in the 1994 amendments, this did not change his role. The necessity for a well-coordinated response to the federal government's water right claims cannot be overstated.

him to present only one position in the SRBA even though the State has many distinct legal interests - some proprietary, some regulatory and some on behalf of the public. .

Citing no authority in its decisions, the District Court ruled that the Attorney General may no longer present these multiple positions and must "speak with one voice." Although this issue was never addressed in the briefing, the District Court justifies its decisions by discussing one particular sub-proceeding, *Rim View*, in which three (3) state agencies participated. Testimony before the Committee contradicted the District Court's description of both this particular sub-proceeding and the enormity of the problems created by the State appearing in more than one role. As discussed above, there are very few state proprietary claims. Therefore, multiple representations should not delay proceedings. With respect to *Rim View* itself, it does not appear that the State's participation delayed the proceedings in any way. Significantly, the parties reached a settlement and this settlement was presented to the District Court for its approval in 1993. The settlement agreement remains under consideration by the District Court.

#### D. *Role of Idaho Water Resource Board*

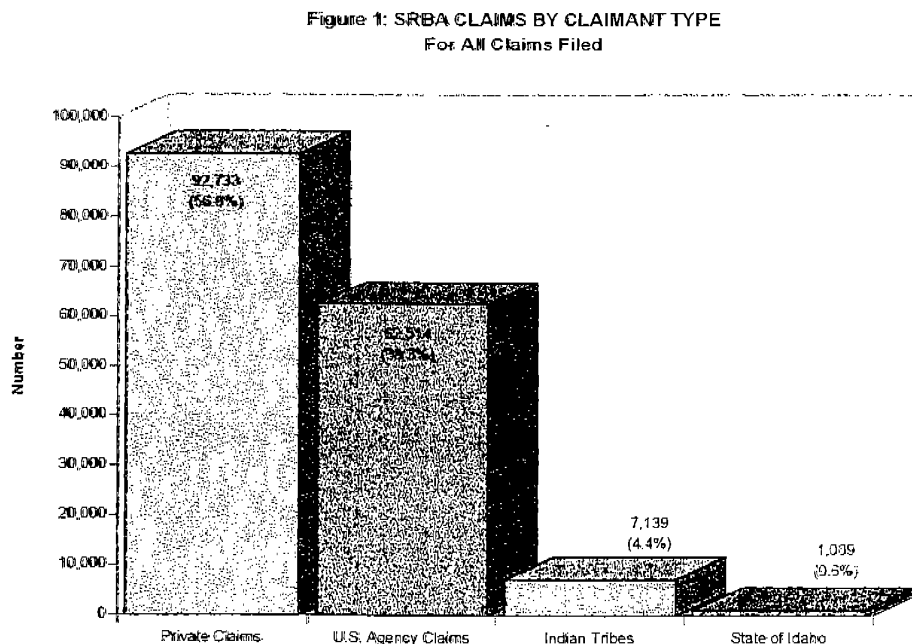
The Legislature, by Joint Resolution, directed that the State negotiate with the federal government regarding the water right claims for the Fort Hall Indian Reservation. The Water Resource Board was appointed by Executive Order to conduct those negotiations, as well as negotiations regarding the scope and extent of the other federal claims.

The Water Resource Board, working with the Attorney General's Office, has completed negotiations of the federal reserved water right claims for the Fort Hall Indian Reservation, the Craters of the Moon National Monument, and the Idaho National Engineering Laboratory. Negotiations are continuing with the Nez Perce Tribe, the Shoshone-Paiute Tribes at the Duck Valley Reservation and the U.S. Department of Agriculture, Forest Service.

## V. SCOPE OF THE SNAKE RIVER BASIN ADJUDICATION

Over 87% of the State of Idaho is included within the Snake River Basin and thus within the adjudication. To date 163,395 claims have been filed in the SRBA.<sup>4</sup> There are two types of water rights claimed. The first type of claim is based upon the development of water pursuant to the laws of the State of Idaho. This type of claim is referred to as a state law claim. The second type of claim is based upon an implied or express reservation of water by Congress for federal lands that have been set aside for an express purpose. This type of claim is referred to as a federal reserved water right or federal law claim. The United States and the Tribes have filed both types of claims in the SRBA.

Figure 1 shows the total number of claims filed by claimant type.



"Private Claims" refers to state law claims filed by individuals, businesses and local governments. "U.S. Agency Claims" refers to claims filed by federal agencies on their own behalf or on behalf of Indian tribes. "Indian Tribes" refers to claims filed by the tribes on their own behalf.

<sup>4</sup> Data in this section is based upon a computer sort of the IDWR claims data base. Because of terminology used by claimants, the actual number of claims within the categories may vary slightly from the computer results.

Figure 2 shows the total number of state law claims filed by claimant type.

**Figure 2: CLAIMS BASED ON STATE LAW**

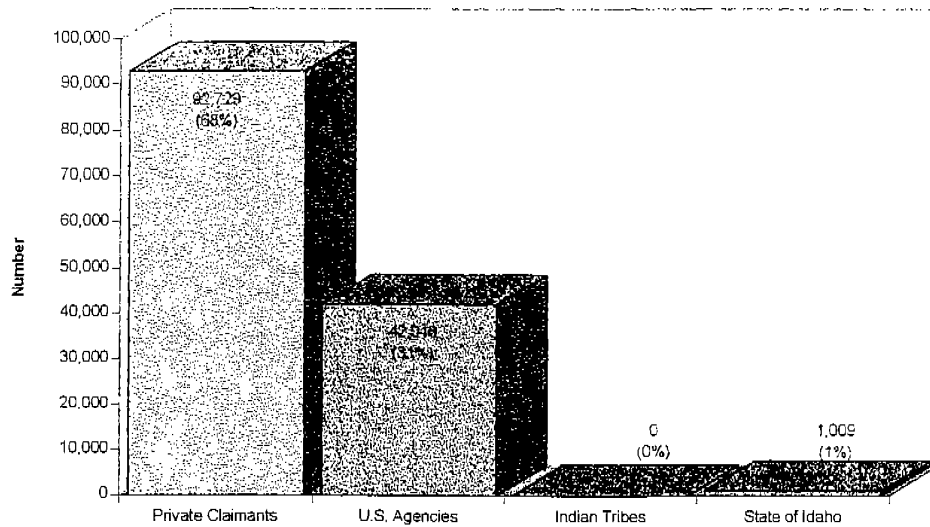


Figure 3 shows that claims based upon state law far outnumber the claims based upon federal law.

**Figure 3: DIVISION OF CLAIMS  
Based on State Law versus Federal Law**

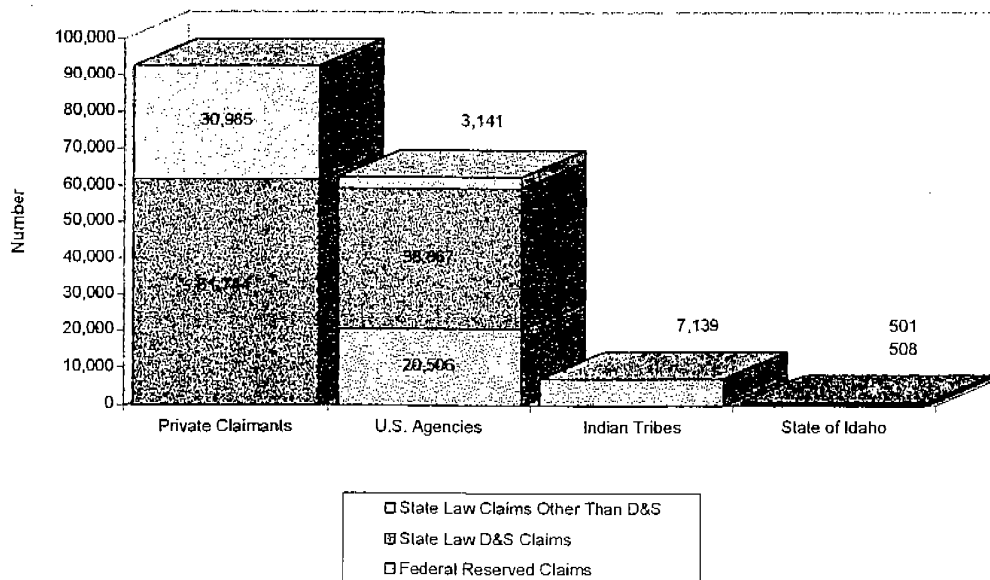
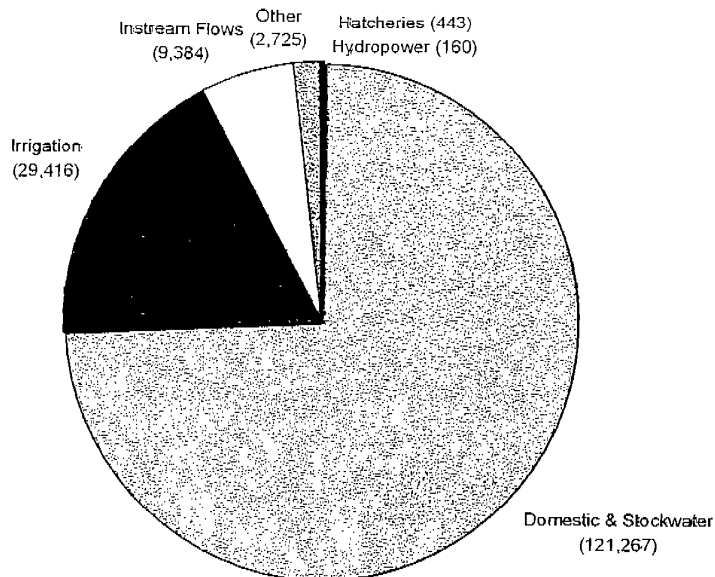


Figure 4 demonstrates that domestic and stock water claims constitute the largest category of use.

Figure 4: SRBA CLAIMS BY CATEGORY



The total number of claims, while informational, does not tell the whole story. In order to understand the relative impact of various types of water rights, it is also necessary to consider their diversion rates. Figure 5 provides a breakdown of the number of domestic and stockwater claims by diversion rate.

Figure 5: Breakdown of Domestic & Stockwater Claims by Diversion Rate

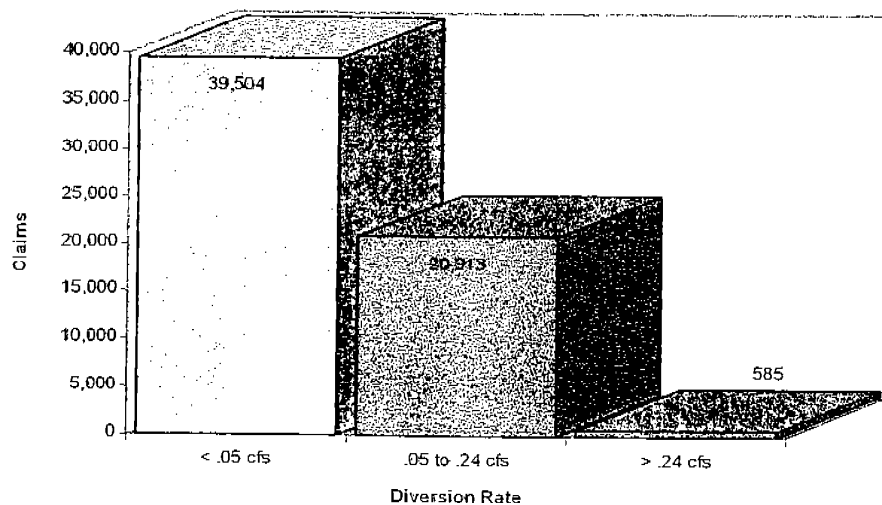




Figure 6 provides a breakdown of the number of irrigation claims by diversion rate.

Figure 6: Breakdown of Irrigation Claims by Diversion Rate

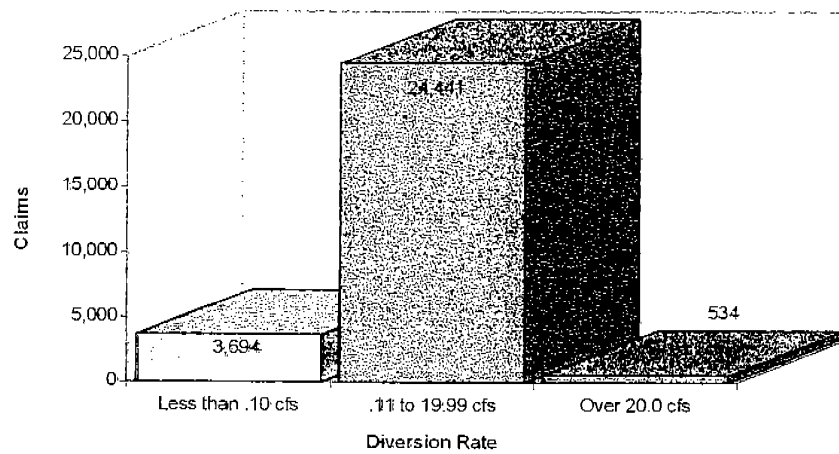


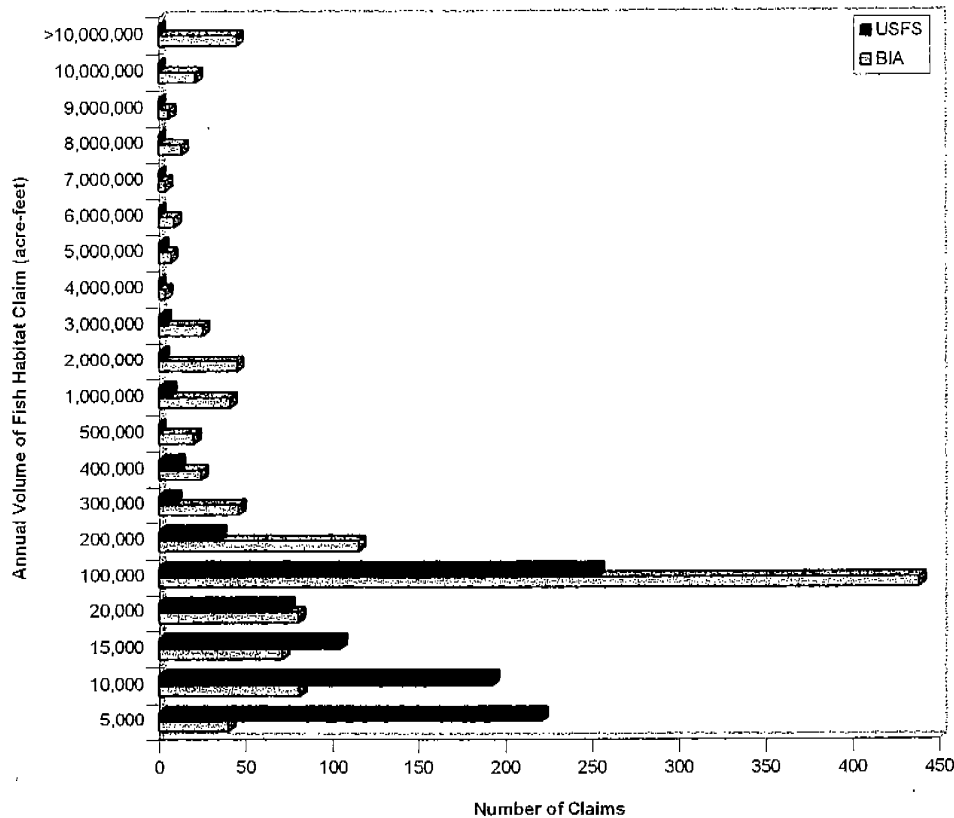
Table 1 provides an overview of the instream flow claims of the federal government. The table provides the names of the agencies making claims, the approximate number of claims and the purposes of use.

Table 1. Claims to federal reserved rights for instream flows.

Claimant	Number of Claims	Purpose of Claim
BIA (for Nez Perce)	1133	Fish, riparian habitat and channel maintenance.
Nez Perce Tribe	1134	Fish, riparian habitat and channel maintenance.
Shoshone-Bannock Tribes	1067	Fish, riparian habitat and channel maintenance.
Northwestern Band of Shoshoni Nation	27	Fish, riparian habitat and channel maintenance.
Shoshone-Paiutes	3	
United States Forest Service	1359	Channel Maintenance
	912	Fish
	2	National Recreation Areas
	3	Wilderness
	78	Recreation
	57	Hot Springs
	1342	Lake Levels
	7	Wild and Scenic Rivers
<b>Total United States Forest Service Claims</b>	<b>3760</b>	
National Park Service (City of Rocks)	1	Channel Maintenance
United States Fish and Wildlife Service	1	Wildlife at Deerflat Wildlife Refuge

The total annual volume of the claims cannot be quantified because the federal instream flow claims for channel maintenance vary based upon the amount of water in the stream at any given moment. Fish habitat claims, however, can be quantified because they are based on fixed flows that do not change from year to year. Figure 7 shows the number and size of the instream flow claims for fish habitat filed by the United States Forest Service and the Bureau of Indian Affairs.

Figure 7: Amount and Distribution of Instream Flow Claims for Fish Habitat Made by United States Forest Service and Bureau of Indian Affairs



The Bureau of Indian Affairs (BIA) claims are filed on behalf of the Nez Perce Tribe. The Nez Perce Tribe and the Shoshone-Bannock Tribes have filed claims substantially mirroring those of the BIA. The Northwest Band of Shoshoni has also filed substantial instream flow claims. The total volume of the claims for fish habitat is difficult to describe: simply adding the claims together results in a total federal and tribal instream flow claim of over 4.5 billion acre feet per year. The result is misleading, since many of the claims are duplicative. A better method for appreciating the magnitude of the federal and tribal claims is to compare the claims to the average annual flows estimated by the Forest Service and the BIA. On average, the Forest Service claims 98% of the average annual runoff volume of the 912 stream reaches included in its instream flow claims for fisheries habitat. The BIA claims 113% of the average annual runoff volume of 1133 stream reaches. An example of how fishery habitat claims exceed the amount of available water is seen in Figure 8, which compares the BIA fisheries flow claim for

the Snake River in the Weiser to Brownlee Dam reach against the mean daily flow and the low flow.

**Figure 8: Snake River Mean Daily Flows for the Month, Weiser to Brownlee Dam and Fisheries Habitat Flow Claims of the Bureau of Indian Affairs**

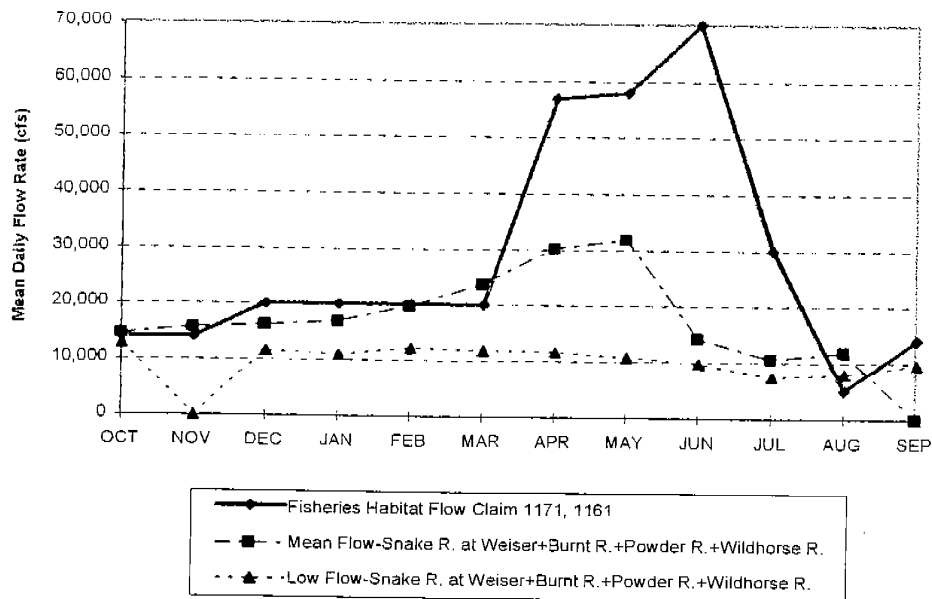
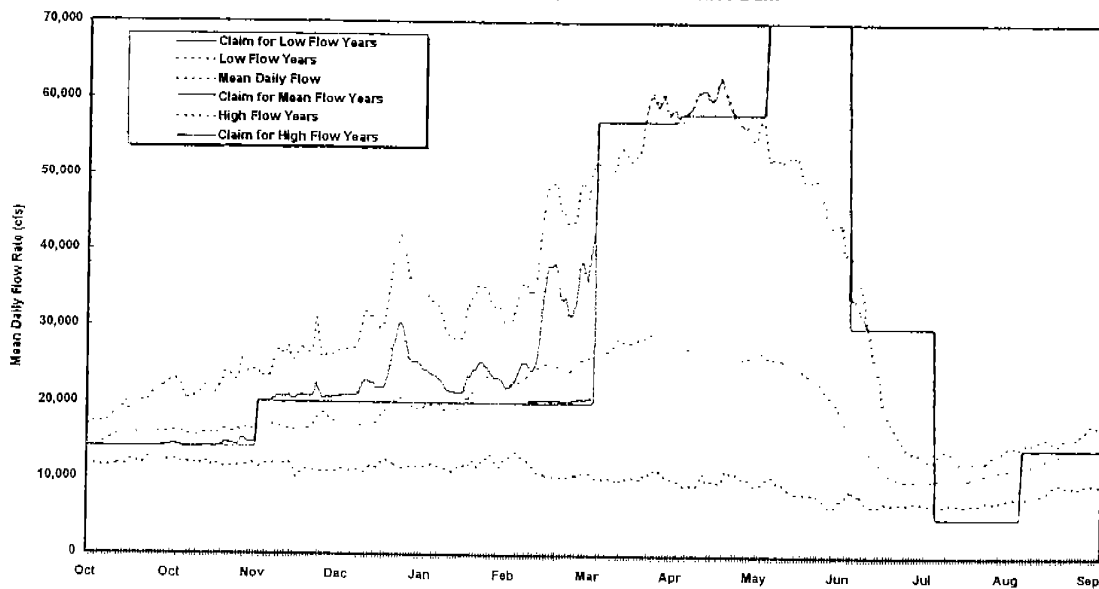


Figure 9 shows how the channel maintenance claim for the same stretch of the Snake River varies in high, mean, and low water flow conditions. Except in high water conditions, the channel maintenance claim exceeds daily flows throughout most of the year.

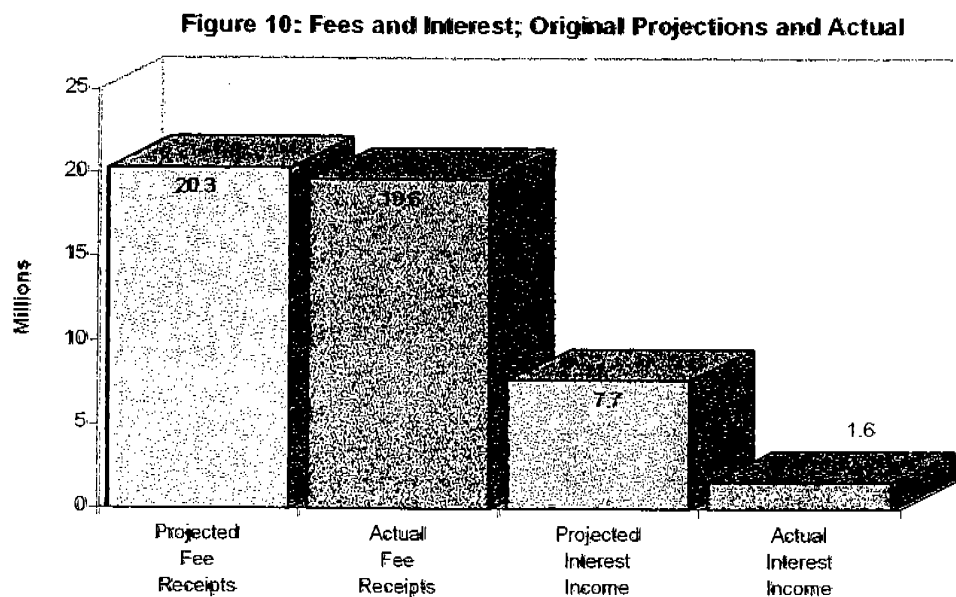
**Figure 9: Bureau of Indian Affairs Channel Maintenance Claim for Snake River, Weiser to Brownlee Dam**



## VI. SNAKE RIVER BASIN ADJUDICATION FUNDING

The SRBA, when authorized in 1985, was projected to cost \$28 million. This projection assumed that 114,000 claims would be filed. The projection did not take into account the cost of processing domestic and stock water claims, the costs of adjudicating the claims of the federal government, or the costs of the judiciary. Of this total, \$20.3 million was to be paid with filing fees paid by the claimants, and \$1 million from the general fund. The balance was to be paid from interest earned on the filing fees. It was assumed that the cost of adjudicating the claims of the federal government would be covered by the filing fees paid by the federal government for its water right claims. The Bureau of Reclamation had stated that it would pay the filing fees and it was believed that other federal agencies would agree to pay the filing fees.

To date, approximately \$19.6 million in filing fees have been collected. As discussed in paragraph III. J. above, the United States was successful in its challenge to the payment of the adjudication filing fees. This fact, combined with the failure to account for the cost of processing domestic and stock water claims, judicial expenses and delays in the proceeding, has contributed to a shortfall in the funding of the adjudication. In addition, only \$1.6 million of interest income has been received, which is \$6.1 million below the projected interest income receipts.



SRBA expenditures to date are shown in Figure 11. The majority of expenses, \$8.6 million, has been for claims investigation and the preparation of director's reports.

Figure 11: SRBA Fee Account Expenditures  
\$16.8 Million Total Expenditures Through December 31, 1994

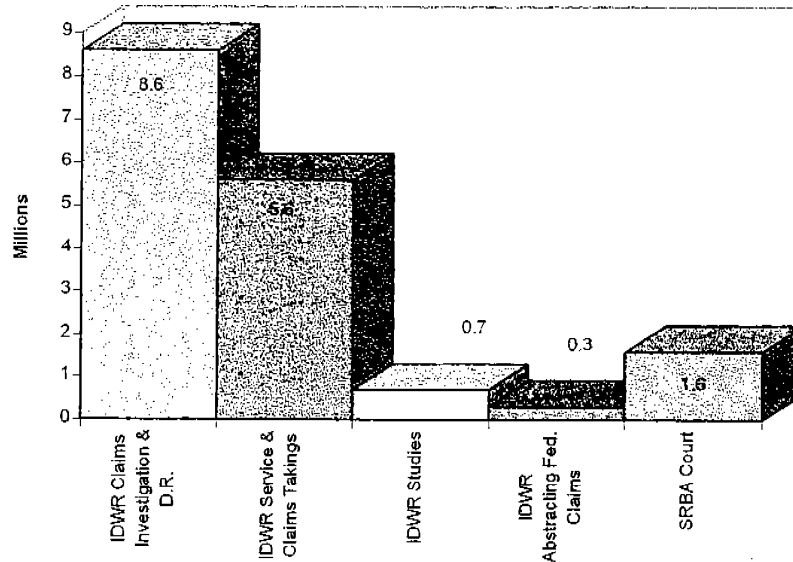
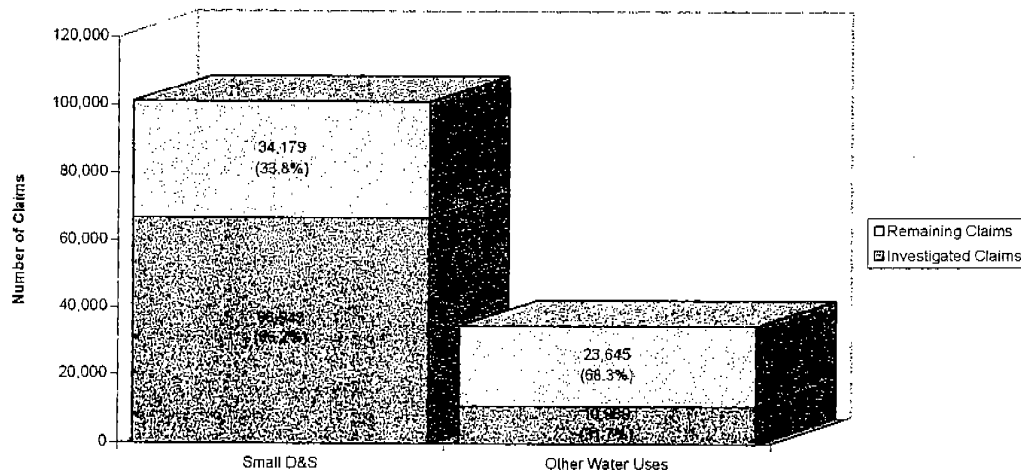


Figure 12 shows the total number of claims and the number of those claims that have been investigated.

Figure 12: Progress of Investigating SRBA State Law Claims  
(D&S through 9/29/94; Others through 11/07/94)



Some of the claims investigated under the "other water uses" category will have to be reexamined as a result of the SRBA District Court's decision on Basin-Wide Issue #1 and may be affected by its pending decision in Basin-Wide Issue # 4.

At present, the annual budget for the IDWR and the judiciary from the adjudication account is approximately \$4 million.

IDWR projected a need of \$32 million to fund the adjudication through FY2003 prior to the Basin-Wide Issue #2 and #3 decisions. Based upon the current rate of expenditures IDWR predicted that there are sufficient funds in the adjudication account to cover all IDWR and judicial expenses through FY95. Additional funding will be necessary beyond FY95. This projection assumed that no new mandates would be placed on the IDWR by the SRBA District Court and no awards of attorneys fees would be made against the IDWR. More recently, as a result of the SRBA District Court's Basin-Wide Issues # 2 and # 3 decisions that among other things require a significantly more active participation by IDWR than even the 1986 amendments required, IDWR estimated that the total cost of the SRBA may double.

A subcommittee of this Committee met on June 20, 1994, to discuss methods for funding the SRBA. The subcommittee considered the following alternatives for funding the SRBA: 1) a water use tax, 2) an increase in the adjudication filing fee, 3) a special dedicated sales tax, and 4) an appropriation of money from the general fund. In addition, the subcommittee discussed the need for developing methods to reduce the cost of the adjudication.

Based upon the absence of any reliable means of predicting the total adjudication costs, the subcommittee developed an interim funding recommendation. The recommendation consisted of three parts.

First, the congressional delegation should be encouraged to seek an appropriation to reimburse the state for the expenses it is incurring in adjudicating federal water right claims. At present, the federal government is getting a free ride on the back of Idaho taxpayers and water users. As a matter of fairness, the federal government should be required to pay the same fees required of all other claimants.

Second, a five year funding plan should be adopted. Based upon the current \$4 million annual expenditures of IDWR and the judiciary, the subcommittee recommended that \$10 million of the FY95 surplus be appropriated to the adjudication account to be expended at a rate of \$2 million per year. A general fund appropriation of \$2 million was recommended to provide the balance of the funding need.

The recommendation of \$20 million in general fund support was premised on the need for equitable sharing of the costs between the general public and the claimants. Since all citizens of Idaho will benefit from better water management, it was felt that the state as a whole should provide funding equivalent to the amount of filing fees paid by the claimants. Increased filing fees were rejected because the original SRBA filing fee schedule was represented to the claimants as adequate to fund the adjudication. A water use tax was rejected because of the administrative difficulty of collecting small amounts of money from a very large number of water users. For example, over two-thirds of the claims in the SRBA are for domestic and stock water use; however, these claimants use less than five percent of the total water diverted from the

Snake River basin. A special sales tax was rejected because of the absence of accurate information to predict what funding will be needed for the SRBA.

The subcommittee expressed great concern regarding the funding of the adjudication from the general fund for more than five years. Thus, it recommended that annual oversight of the adjudication continue and that a permanent funding solution be developed. It further recommended that a water use tax be considered as one of the permanent funding solutions.

## VII. WESTERN STATES' ADJUDICATION PERSPECTIVE

Almost all states across the West are engaged in general stream adjudications; however, the scope of these adjudications ranges from very small adjudications to statewide adjudications. Each of the states has enacted comprehensive statutory procedures for the conduct of adjudications. Although the procedures vary, they share the common element of placing the agency responsible for administering water rights in the role of overseeing many of the activities of general stream adjudications. In the larger adjudications, this has created conflict between the various branches of government.

The following states are involved in substantial adjudication efforts at the present time:

1. Arizona

Arizona has a growing population and one of the shortest water supplies of any of the western states. It is addressing this water supply problem by proceeding with adjudications of the Gila River water system and the Little Colorado River water system. More than 67,000 claims to the use of water have been filed in *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, Nos. W-1, W-2, W-3, W-4 (Ariz. Super. Ct., Maricopa C'ty, Mar. 27, 1980) and over 11,000 claims to the use of water in *In Re the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, No. 6417 (Ariz. Super. Ct., Apache C'ty, May 19, 1980). Water right claims have been filed on behalf of eight Indian Tribes.

The Arizona general stream adjudication procedure has been challenged on several occasions. The United States and the Tribes initially challenged Arizona's right to adjudicate federal reserved water rights. The United States Supreme Court and Arizona Supreme Court rejected these challenges. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985). More recently, a conflict has arisen among the Special Master, the Arizona Department of Water Resources and some of the claimants over the procedures that govern the adjudication. As a result of this conflict, the Arizona State Legislature formed a Joint Select Committee on Arizona General Stream Adjudications. The Joint Committee has been meeting for the past six months to develop recommendations to streamline the Arizona general stream adjudication procedures. Arizona is addressing many of the same issues that have arisen in Idaho. The charge to the Joint

Committee is similar to the charge to this Committee--find a way to do a better job that costs less money.

2. Montana

Montana is engaged in a general adjudication of all the water rights within the state. Approximately two hundred thousand claims are involved. The adjudication began in 1973 with an examination of two Powder River basins. In 1979, the Legislature amended the adjudication process to create a system of water judges. In addition, the Legislature statutorily redefined the Montana Department of Natural Resources' role to be an expert assistant to the water judges.

The 1979 amendments led to a conflict between the Montana Department of Natural Resources and the Montana Water Court. In a March 31, 1987 decision, the Montana Supreme Court declared it would promulgate rules covering the verification of water right claims and prohibited the DNR from adopting rules on this subject. *In re the Matter of the Activities of the Department of Natural Resources and Conservation*, 740 P.2d 1096 (Mont. 1987). There have been ongoing adjustments to the adjudication process by the Montana Legislature since the Supreme Court's decision in 1987.

In response to Montana's statewide adjudication effort, the United States and several Tribes commenced separate actions in federal court. Montana sought to have these actions dismissed. Ultimately, the United States Supreme Court affirmed the Federal District Court's dismissal of these federal cases in *Northern Cheyenne Tribe v. Adsit*, a companion case consolidated with *San Carlos Apache Tribe v. Arizona*.

Montana created a Reserved Water Rights Compact Commission to negotiate with the federal government. It has negotiated a settlement agreement regarding the nature of the reserved water rights held by the United States for the Fort Peck Indian Reservation and the Yellowstone National Park.

3. Oregon

Oregon commenced a partial adjudication of the water rights of the Klamath River water system in 1975. Over 25,000 potential claimants were notified of the commencement of the adjudication. The United States challenged Oregon's jurisdiction under the McCarran Amendment because the adjudication began as an administrative action. On December 28, 1994, the United States Court of Appeals for the Ninth Circuit rejected the United States challenge. *United States v. Oregon*, \_\_ F.2d \_\_, 1994 W.L. 715102 (9th Cir. December 28, 1994). The United States may seek review of the Ninth Circuit opinion by the United States Supreme Court.

4. Washington

Washington commenced the adjudication of the water rights of the Yakima River water system in 1977. *State of Washington, Department of Ecology v. Acquavella*, No. 77-2-01484-5



(Wash. Super. Ct., Yakima C'ty). There are about 10,000 claims, including tribal claims for instream flows for anadromous fish.

## 5. Wyoming

Wyoming commenced the adjudication of water rights of the Bighorn River water system in 1977. *In Re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Nos. 85-203, 204, 205, 217, 218, 225, 226, 236. It includes substantial claims for the Wind River Indian Reservation--a reservation created under the same treaty that applies to the Fort Hall Indian Reservation. The State of Wyoming, private water users, the United States, and the Tribes of the Wind River Indian Reservation litigated the extent of the reserved water right for the reservation. The United States and the Tribes successfully established a very large claim for irrigation with an early priority date. A major conflict between the Tribes and non-Indian water users has resulted from the litigation. There is ongoing conflict regarding what the Tribes may do with their water and who will administer the water rights within the basin.

Colorado and New Mexico also are actively engaged in general stream adjudications. Colorado water rights are established through the Colorado Water Court; thus, it is engaged in an ongoing adjudication of all water rights. New Mexico, on the other hand, has numerous smaller general stream adjudications proceeding throughout the state.

## VIII. COMMITTEE RECOMMENDATIONS

The SRBA is one of the largest governmental undertakings in the history of the State of Idaho. The Legislature authorized the adjudication in 1985 to provide finality and certainty with respect to all water rights and to address the federal government's impending claims. While significant gains have been achieved with respect to the negotiation of federal reserved water right claims, the testimony presented during the last legislative session and before the 1994 Interim Legislative Committee on the SRBA demonstrates that the adjudication is mired in controversy.

The Committee was directed to examine methods for funding and streamlining the adjudication. In performing this task, the Committee avoided the temptation to respond to every controversy created by or identified in the SRBA. Nonetheless, the Legislature must not hesitate to pass corrective legislation or control funding to ensure that the purposes of the SRBA are being achieved.

Although there is sentiment for terminating the SRBA, such action at this time is not appropriate. Idaho has a finite water supply and there are real disputes over the use of this supply that must be resolved. If these disputes are ignored, they will simply become more difficult to resolve. In addition, one of the major reasons for originally creating a comprehensive general adjudication for the Snake River Basin was to adjudicate the looming federal claims. Discontinuing the SRBA would open the door to adjudicating those claims piecemeal in federal

court without a comprehensive review of all claims. Thus, the Committee recommends continuation of the SRBA.

The Committee is troubled by the SRBA District Court's recent decisions. As University of Idaho Professor Colson testified, the decisions are long on conviction but short on analysis. The decisions improperly question the motives of the Legislature in enacting the 1994 adjudication amendments and fail to adhere to the most fundamental rule of constitutional interpretation that a statute is presumed constitutional. Moreover, the decisions reflect a fundamental misunderstanding of the separation of powers doctrine and interfere with the constitutional powers of the Idaho Legislature and those of the Attorney General. While the Committee appreciates the very difficult task that has been given to the SRBA District Court, the SRBA District Court must likewise respect the Legislature's ability to oversee and enact legislation to address problems arising in the adjudication. Thus, the Committee recommends that the Legislature intervene in the appeals of Basin Wide Issues #2 and # 3.

In addition to intervening in the appeals, the Committee has identified several additional measures that should be considered. These measures were developed after consideration of testimony by Chief Justice McDevitt, representing the judiciary, members of the executive branch and, in particular, the detailed comments made by the claimants. The recommendations are not intended as a criticism of the efforts of any agency or branch of government but, rather, are offered to defuse some of the conflict that has developed to date, to streamline the SRBA and to save taxpayer monies.

A. *Goals for the Snake River Basin Adjudication*

Those who testified before the Committee repeatedly suggested that the SRBA's goals are unfocused and need to be clarified. Many testified that they understood the adjudication would simply catalogue their water rights. Some suggested that the SRBA's role is more expansive. Others testified that the adjudication was improperly being expanded into a forum for the resolution of all water issues and thus frustrating the primary purposes of the adjudication. Given the confusion regarding the adjudication's goals, it is not surprising that the SRBA has gotten off course. Moreover, the absence of clearly articulated goals has made it difficult for the Committee to evaluate whether the SRBA is achieving the desired ends. Thus, the Committee recommends the adoption of the following statement of substantive goals for the SRBA:

1. All water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.

2. All water rights acquired under federal law must be quantified, their relative priority determined, and their legal and hydrologic relationship to state-law based rights must be established.

3. The decree must contain sufficient information for state administration of all federal as well as state water rights. The McCarran Amendment provides a basis for state administration of federal water rights. The language of the McCarran Amendment, 43 U.S.C. § 666(a)(2), defers to the entire body of water law administration procedures of each state, regardless of the forms in which they may exist. *Federal Youth Center v. District Court of Jefferson County*, 575 P.2d 395, 400 (1978). In order for effective administration of water, the State must fully exercise this authority. While the quantification of water rights is important, it is of little use if the decree fails to provide an adequate basis for future administration. The State must know how each water right relates to another with sufficient legal and hydrologic certainty to ensure delivery in accordance with priority and in order to know what water supplies remain for future use. Thus, the final decree in the SRBA must contain those provisions necessary to allow the IDWR to administer the federal and state water rights as decreed.

In the end, the SRBA must effect some finality on each of these points. That finality, however, cannot be left to some indefinite time in the future. Because of the pressing demands on Idaho's water supply, the SRBA must not follow the route of most other general stream adjudications--where the adjudications seem to go on indefinitely. Thus, each branch of government should develop measurable criteria that demonstrate how these goals will be achieved and a time schedule for completion of its duties.

These projections should be evaluated on an annual basis by the Legislature and any deviations from the time schedule should be explained. While the Committee recognizes that it is not possible to predict with a high degree of certainty how long this process will take, nonetheless, some identifiable target for completion is necessary. In this regard, the Committee recommends that the IDWR and SRBA District Court be requested to jointly develop a date certain for the completion of the SRBA.

#### B. *Funding of the Snake River Basin Adjudication*

Based on the absence of any reliable means of predicting the total cost of the adjudication at this time, the Committee recommends the adoption of the interim funding plan developed by the subcommittee. This recommendation of \$20 million in general fund support is premised on the need for equitable sharing of the costs between the general public and the claimants. Since all citizens of Idaho will benefit from better water management, the State, as a whole, should provide funding equivalent to the amount of filing fees paid by the claimants. Moreover, the Committee believes that the claimants should not bear the additional expenses arising from the federal government's refusal to pay the adjudication filing fee.

The Committee recommends annual oversight of the adjudication continue and that a permanent funding solution be developed over the next five years that eliminates the general fund appropriation. A water use tax should be investigated as one of the permanent funding solutions.

C. *Measures to Streamline and Contain the Expense of the Snake River Basin Adjudication*

The adjudication amendments enacted during the 1994 legislative session contained many measures designed to streamline the adjudication and contain the expense of the SRBA. For example, the amendments clarified the role of the IDWR, encouraged dispute resolution, and eliminated some of the subsidy provided to the United States. The amendments reflect a positive step forward and if fully implemented will provide significant financial relief to the small claimants as well as to all other participants in the SRBA.

Aside from the already enacted adjudication amendments, the Committee recommends legislation addressing which matters are within the SRBA District Court's jurisdiction if this issue continues to be a problem. At present, there is confusion regarding the jurisdiction of the SRBA District Court. This confusion is understandable given the comprehensive nature of the adjudication and the Idaho Supreme Court's statement in *Walker v. Big Lost River Irrigation District* that "once [the] SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA District Court only." 124 Idaho 78, 81 (1994). These factors have led some claimants to assume that any issue involving a water right must be brought in the SRBA District Court. Indeed, some district courts are simply transferring water law cases to the SRBA District Court regardless of whether the case involves a determination of a water right. This trend diverts attention away from adjudication of water rights and has the potential of further derailing the adjudication.

Adoption of the following new section to the adjudication statute would clarify that appeals of administrative decisions by the Director regarding the issuance of a water right and the transfer of a water right are not within the jurisdiction of the SRBA District Court:

NEW SECTION. Appeals of administrative decisions of the department of water resources under section 42-1701A, Idaho Code, the Idaho Administrative Procedure Act, or other challenges to the administrative actions of the department of water resources, shall not be heard in any proceeding under this chapter.

D. *Recommendations to the Judiciary and Department of Water Resources*

The Committee makes the following recommendations to the Judiciary and the IDWR. These recommendations were suggested to the Committee by various participants and warrant the consideration of the respective branches of government.

1. Representation of small entities.

Small family corporations and partnerships have been required to obtain an attorney to appear in the SRBA. The Chief Justice testified, however, that the principal in a family corporation or partnership can submit claims and appear in the SRBA. The Committee encourages the Idaho Supreme Court to issue a rule or clarifying statement regarding this matter.

2. Scheduling of federal claims.

A significant amount of testimony focused on the difficulty the SRBA District Court and IDWR are confronting in processing the over 163,000 claims in the SRBA. At present, water rights are being decreed by reporting area. A reporting area represents an identifiable watershed within the Snake River Basin. The schedule for IDWR to file reports within each reporting area takes into account IDWR staffing and the desire to sequence the reporting of adjacent reporting areas. While the current reporting schedule makes sense in general, the data submitted to the Committee suggests that a few minor modifications to the current schedule might expedite the adjudication.

The United States is the largest player in the SRBA. While it is not possible to accurately state the volume of water claimed by the federal government, it is apparent from a brief examination of the federal reserved water right claims that the volume is likely to be greater than one-third of the total water claimed in the SRBA. Moreover, the priority date of many of the federal reserved water right claims is the earliest priority date within the Snake River Basin. Thus, how these federal reserved water right claims are decreed is likely to affect all other claims.

The Committee has been advised that many of the objections the United States is currently filing against other state water right claims are protective objections because the United States is uncertain how its federal reserved water right claims will be decreed. By scheduling the federal reserved water right claims first, the forty percent objection rate by the United States might be reduced.

Given this fact, the Committee recommends that the SRBA District Court and IDWR consider adjudicating these claims first. Implementation of this recommendation would not require any significant modification of the current schedule. The federal instream flow claims are already filed as one Director's Report. Thus, only the consumptive use claims would have to be reported to implement this suggestion.

3. Scheduling of small domestic and stock water claims.

Approximately two-thirds of the claims in the SRBA are domestic and stock water claims. These claims, however, represent less than five percent of the total water supply claimed in the SRBA. These claims represent a relatively insignificant portion of the total volume diverted but are an enormous drain on resources of all parties, the SRBA District Court and IDWR. The Committee recommends that these claims be reported in a single report and decreed. This would greatly reduce the size of subsequent reports.

4. Scheduling of water rights decreed in prior general stream adjudications.

The Lemhi and Payette Rivers have been the subject of recent general stream adjudications. Since the entire river basins have been adjudicated and they are headwater streams, these decreed water rights should be reported before they become outdated by changes in the water rights.

5. Alternative dispute resolution.

The Committee commends the Supreme Court for its decision to appoint a settlement judge for the SRBA. Alternative dispute resolution procedures are essential to a timely completion of the SRBA. Litigation is not only costly but requires a significant amount of time. A heavy emphasis on settlement alternatives will significantly benefit all participants in the SRBA. This process, however, must be simple and easy to implement.

6. Other procedural mechanisms.

Recognizing that some matters will have to be litigated, the Committee encourages the SRBA District Court to use its power to align parties who are involved in the same issues and appoint lead counsel where possible. Consolidation of issues and parties can help to reduce the overall cost of this proceeding to all parties as well as the state.

7. IDWR Rules.

Some claimants are opposed to Idaho Code §§ 42-1425, 42-1426, and 42-1427 (the "amnesty" statutes). These statutes were adopted by the Legislature in an attempt to streamline the investigation of some of the water rights claimed under state law. Challenges to the statutes may further delay the adjudication unless such challenges are brought in a way that puts at issue how the statutes will be applied. The Committee encourages IDWR to adopt regulations explaining how it will apply the statutes. These regulations would provide a basis for determining whether they are constitutional as applied.

E. *Conjunctive Management of Ground and Surface Water Rights*

Conjunctive management of ground and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication. In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam. *Idaho Power Co. v. State*, 104 Idaho 575, 588 (1983); *In re Snake River Basin Water System*, 115 Idaho 1, 2-3 (1988). The SRBA must proceed in a fashion that advances wise conjunctive management of our ground and surface water.

Historically, conjunctive management has not occurred in Idaho, especially between the Snake River Plain Aquifer and the Snake River. To conjunctively manage these water sources a

good understanding of both the hydrologic relationship and legal relationship between ground and surface water rights is necessary.

Although these issues may need to be resolved by general administrative provisions in the adjudication decrees, they generally relate to two classic elements of a water right--its source and priority. The SRBA should determine the ultimate source of the ground and surface water rights being adjudicated. This legal determination must be made in the SRBA. The IDWR should provide recommendations to the SRBA District Court on how it should do so. Further, the SRBA District Court must determine the relative priority between surface and ground water rights.

If the SRBA proceeds and these issues are not addressed, a major objective for the adjudication will not have been served. Conjunctive administration will be set back, and another generation of ground and surface water users will be uncertain regarding their relationship to each other.

The Committee also recommends adoption of ground water district legislation. The general purposes sought from such legislation are:

1. Establishment of an organization that can develop and implement mitigation plans.
2. Establishment of an organization that can speak for ground water users in both the legislative and legal arena where appropriate.
3. Establishment of the framework for administration of ground water rights.
4. Establishment of a means for implementation and enforcement of ground water measurement.

Those who testified were deeply split over whether participation in the ground water districts should be mandatory and whether the ground water districts should be part of the surface water districts.

The Committee recommends that ground water district legislation be introduced; however, because of the differences that exist over the scope of the legislation between surface and groundwater users, the Committee urges the water users to continue their effort to develop consensus legislation for consideration by the Legislature.